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LEFFERT JAY & POLGLAZE, P.A.
P.O. BOX 581009
MINNEAPOLIS, MN 55458-1009

EXAMINER	
CASTELLANO, STEPHEN J	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte WAYNE ALLEN WADE

Appeal 2009-003603
Application 10/600,263
Technology Center 3700

Decided:[1] July 27, 2009

Before RICHARD E. SCHAFER, SALLY C. MEDLEY, and MICHAEL P. TIERNEY, *Administrative Patent Judges*.

TIERNEY, *Administrative Patent Judge*.

DECISION ON APPEAL

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[1] The two-month period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

A. STATEMENT OF THE CASE

This is a decision on appeal by the real party in interest, Norwesco, Inc. under 35 U.S.C. § 134(a) from a final rejection of claims 1-2, 4-8, 18-19, and 21-22, the only claims on appeal. Claims 3, 9-17, and 20 were cancelled prior to this appeal. Appellant requests reversal of the Examiner's rejections of claims 1-2, 4-8, 18-19, and 21-22. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

References Relied on by the Examiner

Redding	3,552,599	Jan. 5, 1971
Clarke	5,667,113	Sep. 16, 1997

The Rejections on Appeal

The Examiner rejected claims 1-2, 4-8, 18-19, and 21-22 under 35 U.S.C. § 103(a) as unpatentable over the combination of Redding and Clarke. Appellant argues the patentability of independent claims 1 and 18,[2] and does not separately argue the remaining claims (claims 2, 4-8, 19, and 21-22). (Br., 1).

The Invention

The invention relates to a thermoplastic septic tank having opposing ports and a plurality of molded through columns integrally connected to the ports. (Abstract; Br., 10-11, Claims App'x,). Claim 1 is illustrative of the claimed invention and is reproduced below:

[2] Appellant's brief, page 7, provides a heading for claim 8; however, based on the context of this section it is clear that Appellant is arguing claim 18 rather than claim 8.

1. A thermoplastic molded septic tank, comprising:
a container, wherein the container includes an upper chamber moldably connectable to a lower chamber;
one or more substantially circular first ports formed with an opening in the upper chamber;
one or more substantially circular hollow second ports formed with an opening in the lower chamber, wherein the size of the opening formed in the second ports is less than the size of the opening formed in the first ports; and
a plurality of molded through hollow tapered columns integrally engaged with the first ports and second ports.

(Br., 10, Claims App'x.).

B. ISSUE

1. Does Appellant's recitation of a "septic tank" in the preamble require additional structure that is not present in the tank taught by the combination of Redding and Clarke?

2. Does the combination of Redding and Clarke teach one of ordinary skill in the art to utilize a tank having a plurality of molded through hollow columns?

C. FINDINGS OF FACT

Redding

1. Redding discloses a high strength, impact resistant, thermoplastic (polyethylene) fuel tank 16. (Redding, col. 1, ll. 4-7 and col. 2, ll. 25-32).

2. Redding Figures 2 and 4 are depicted below and show Redding's fuel tank, which has hollow columns formed by the matched pairs of opposing projections 30. (*Id.* at Figs. 2 and 4).

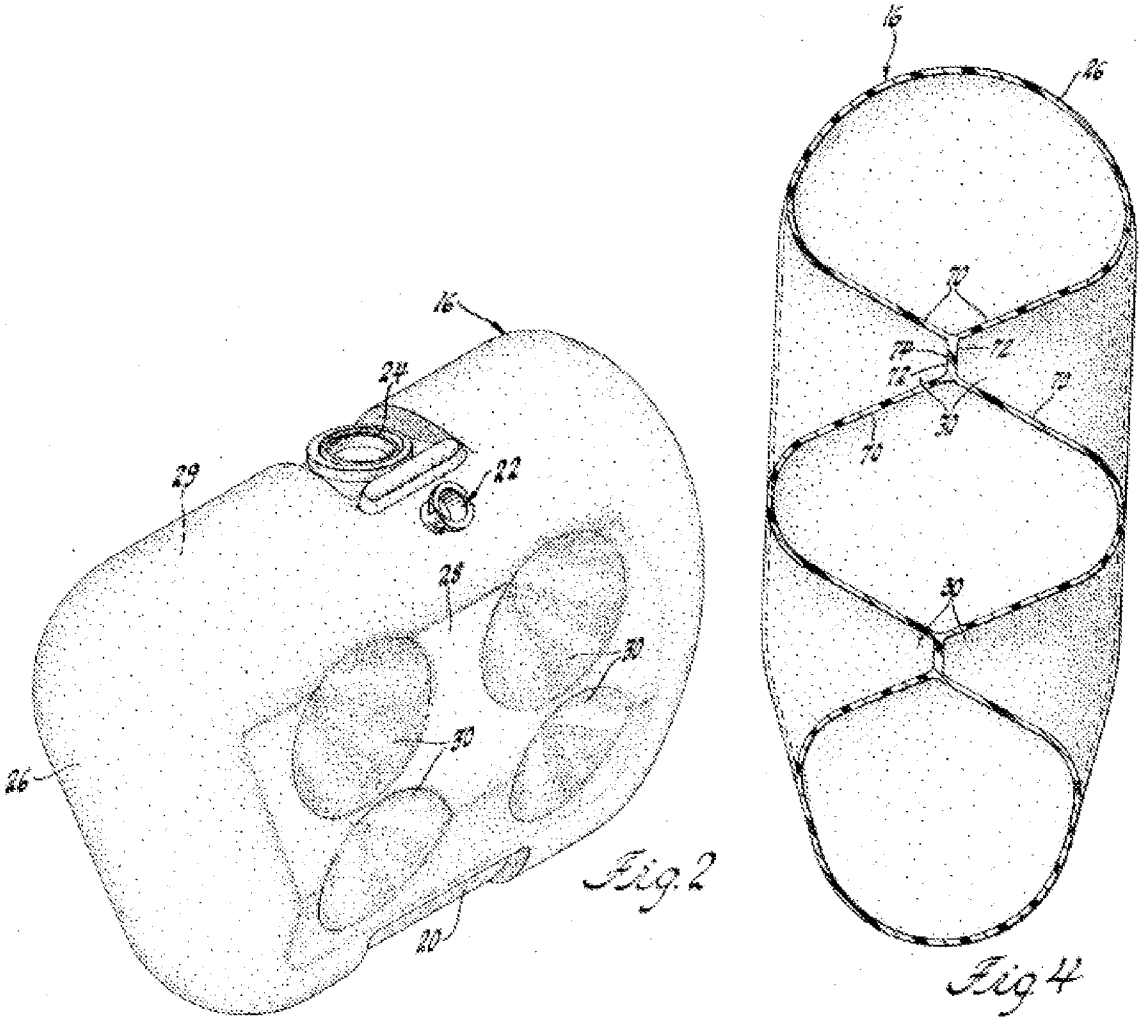

Fig. 2

Fig 4

Redding Figures 2 and 4 are depicted above and show the hollow columns formed by the matched pairs of opposing projections 30.

3. Redding teaches that the columns "impart rigidity," and reinforce the tank, enabling it to resist distortion caused by both internal and external forces. (*Id.* at Abstract, col. 2, l. 72 to col. 3, l. 5).

4. Redding's columns do not extend completely through the fuel tank, because Redding teaches a connecting wall 74 located at the ends 72 of the respective projections 30 at the point where they join together to form the columns. (*Id.* at col. 2, l. 75 to col. 3, l. 3, Figs. 4-5).

5. Redding states that columns having different configurations are equally well-suited to performing the function of the depicted columns. (*Id.* at col. 3, ll. 6-12).

Clarke

6. Clarke, like Redding, is directed to fuel tanks and teaches a variety of different types of reinforcing chambers (columns) 58, 162/164 and 172 for reinforcing fuel tanks. (Clarke, Figs. 3 and 8-9).

7. Clarke Figure 8 discloses a reinforcing column that is similar to the columns taught by Redding, in that Clarke Figure 8 teaches two matched inward projections 162, 164 separated by a central dividing wall 166. (*Id.* at col. 46-57, Fig. 8).

8. Clarke teaches, another type of reinforcing chamber, one without a dividing wall. Specifically, Clarke teaches a tapered hollow column 58, which extends completely through the tank from an opening 62 (port) in the front wall to an opening 64 (port) in the rear wall. (*Id.* at col. 4, ll. 19-21 and 32-34, Fig. 3).

9. Clarke Figure 3 is depicted below and shows the tapered hollow column 58 extending through the tank from a port 62 in the front wall to a port 64 in the rear wall.

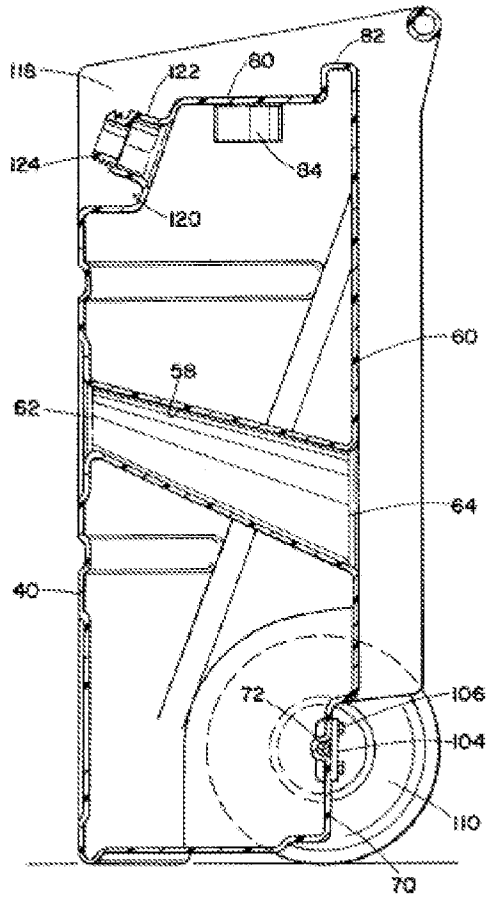

FIG. 3

Clarke Figure 3 is depicted above and shows the tapered hollow column 58 extending through the tank from a port 62 in the front wall to a port 64 in the rear wall.

D. PRINCIPLES OF LAW

While the features of an apparatus claim may be recited functionally, the apparatus must be distinguished from the prior art in terms of structure, rather than function. See *In re Schreiber*, 128 F.3d 1473, 1477-78 (Fed. Cir. 1997).

An invention is not patentable under 35 U.S.C. § 103 if it is obvious. *KSR Int'l Co. v. Teleflex Inc. (KSR)*, 550 U.S. 398, 406 (2007). Any need or

problem known in the field of endeavor at the time of invention can provide a reason for combining elements in the manner claimed. *Id. at* 420. In particular, the combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results. *Id.* at 416.

E. ANALYSIS

The Examiner rejected claims 1-2, 4-8, 18-19 and 21-22 under 35 U.S.C. § 103 as unpatentable over the combination of Redding and Clarke. Appellant argues the patentability of independent claims 1 and 18, but does not separately argue the remaining claims, 2, 4-8, 19, and 21-22. (Br., 1).

The Examiner found that the combination of Redding and Clarke taught all the limitations of Appellant's claims. Specifically, the Examiner determined that Redding's tank could have been used as a septic tank. (Ans., 3 and 5). Moreover, the Examiner determined that it would have been obvious to one of ordinary skill in the art to have utilized a hollow molded through column, in view of the combined teachings of Redding and Clarke. (*Id.* at 4).

Appellant disagrees with the Examiner's determinations and contends: (i) that the device taught by Redding and Clarke is incapable of use as a septic tank and (ii) that Redding does not teach a hollow molded through column. (Br., 5-7).

1. Appellant Has Failed to Demonstrate that the Examiner Erred in Finding that Redding's High Strength Tank Fails to Have the Required Structural and Physical Properties Associated with a Septic Tank

Appellant contends that "Redding is inherently incapable of being used as a septic tank designed to withstand pressures" and further contends that Clarke is not designed to be used as a septic tank. (Br., 6). Appellant additionally contends that Redding "was never intended to be buried or to support the immense pressures of being buried." (*Id.*). Appellant further contends that Redding is not capable of functioning as a septic tank because it "is specifically designed to allow ports 30 to expand from within without rupturing." (*Id.* at 5).

Appellant's claims are directed to a thermoplastic "septic tank." We review the prior art to determine whether it describes the same structure and properties as required by Appellant's claims and do not focus on the intended use of the structure. *See*, *Schreiber* 128 F.3d at 1477-78.

Redding's tank has the same ability to resist forces as Appellant's claimed septic tank. In particular, Redding's tank is designed for high-strength, impact-resistance, and rigidity, so as to provide reinforcement that resists distortion from internal and external forces. (FFs 1 and 3). Appellant has not provided evidence, beyond unsupported attorney argument, to explain why such a high-strength tank is unable to withstand the pressures required of a septic tank. (Br., 11, Evidence App'x, "There is no extrinsic evidence to be considered in this Appeal."). Appellant's unsupported attorney argument that Redding is incapable of withstanding pressure does not take the place of evidence in the record, namely Redding's disclosure demonstrating that Redding is capable of withstanding pressure (resisting

internal and external forces). *Estee Lauder Inc. v. L'Oreal, S.A.*, 129 F.3d 588, 595 (Fed. Cir. 1997). Accordingly, Appellant has not shown that the claimed invention has properties that distinguish the invention from the prior art.

Appellant also contends that Redding is not a septic tank as it "was never intended to be buried or to support the immense pressures of being buried." At the outset, Appellant's have failed to demonstrate that septic tanks, by definition, are placed underground. Further, as discussed above, Redding, like Appellant is made of thermoplastic material. Redding states that its tank is specifically designed to be of high strength and resist external forces applied to the tank. Appellant has failed to provide evidence demonstrating that Redding's high-strength tank, which resists external forces, would be unable to resist the pressure of being buried.

Appellant contends that Redding "is specifically designed to allow ports 30 to expand from within without rupturing." Redding is designed to utilize this expansion feature only when the tank's maximum internal pressure has been exceeded. (Redding, col. 3, ll. 30-44). Appellant's claims do not exclude internal rupturing when a threshold amount of internal force has been exceeded. As Redding teaches that its high-strength tank is designed to withstand internal forces, and as Appellant's claims do not specify a particular internal force threshold, we hold that Appellant has failed to distinguish its claimed thermoplastic tank from that of the prior art.

Appellant's contention that Clarke is not designed to be used as a septic tank is also not persuasive. (Br., 6). Obviousness is not limited to the express teachings of a single prior art reference, but is based upon what the combined teachings of the prior art suggests to the person of ordinary skill in

the art. *In re Keller*, 642 F.2d 413, 425 (CCPA 1981). Redding is relied upon to demonstrate a high-strength tank that has the required physical properties of the claimed septic tank and Clarke is relied upon as teaching that hollow through columns, as well as hollow columns having dividing walls, impart rigidity to tanks. Accordingly, we need not address whether or not Clarke is capable of being used as a septic tank.

2. The Prior Art teaches a Hollow Molded Through Column

Appellant contends that Redding does not teach a hollow molded through column. (Br., 5-6). Appellant acknowledges however, that Clarke "does apparently show a front to rear through port…" (*Id.* at 6).

The Examiner found that the combination of Redding and Clarke taught a septic tank having a plurality of molded through columns that extend from a first port to a second port. (Ans., p. 4). Redding and Clarke recognize that reinforcing columns having different configurations are equally well-suited to performing the function of the columns depicted and described by Redding. (FF 5 and 6). Clarke, in particular, explicitly identifies both molded through columns and columns having dividing walls as providing rigidity to tanks. Thus, one of ordinary skill in the art would have understood that Redding teaches high-strength tanks having columns and Clarke as teaching that reinforcing columns for tanks can be made as hollow molded through columns.

The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results. *KSR* at 416. We hold that the use of familiar elements (using Clarke's hollow molded-though column on Redding's tank) according to known

methods (forming the tank and column from thermoplastic) would have been obvious because it does no more than yield predictable results (a tank with a hollow molded-through column of a known type).

F. CONCLUSIONS OF LAW

1. Appellant's recitation of a "septic tank" in the preamble does not require any additional structure that is not taught by the tank of Redding and Clarke.

2. The combination of Redding and Clarke teaches one of ordinary skill in the art to utilize a tank having a plurality of molded through columns.

G. ORDER

The rejections of claims 1-2, 4-8, 18-19 and 21-22 under 35 U.S.C. § 103(a) as unpatentable over Redding and Clarke are affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

ack

cc:

LEFFERT JAY & POLGLAZE, P.A.
P.O. BOX 581009
MINNEAPOLIS MN 55458-1009